SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 958

MARCOS PEREZ JIMENEZ, *Petitioner,*

v.

GUY W. HIXON, UNITED STATES MARSHAL, SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION,

and

MANUEL ARISTEGUIETA, CONSUL GENERAL OF THE REPUBLIC OF VENEZUELA, MIAMI, FLORIDA, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR REHEARING

DAVID W. WALTERS
1008 Ainsley Building
Miami 32, Florida

EUGENE GRESSMAN
1730 K Street, N. W.
Washington 6, D. C.

Counsel for Petitioner

June 7, 1963.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR REHEARING

Petitioner respectfully prays that this Court grant rehearing of its order of May 13, 1963, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in the above-entitled case as prayed for in the petition filed herein on March 28, 1963.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

Subsequent to the denial of certiorari in this case, Judge Tyler of the United States District Court for the Southern District of New York on May 23, 1963, issued an opinion in an extradition proceeding under 18 U.S.C. §3184, entitled *In the Matter of Clodovco Ortiz Gonzalez*. That opinion, which is non-appealable under §3184, serves to emphasize the critical importance of the constitutional issue at stake in the instant case and to express an approach to the "political offense" concept in direct conflict with that adopted by the court below. A copy of Judge Tyler's opinion is appended hereto, p. 10, *infra*.

A. The Constitutional Issue

The *Ortiz* opinion of Judge Tyler, like the certification of Judge Whitehurst in the instant case (Pet. App. C., pp. 34a-39a), is a classic example of an advisory opinion that is reviewable and reversible by the Secretary of State. In neither case is the Secretary bound to accept the findings or determinations of the committing magistrate. Article III of the Constitution, as interpreted by this Court, flatly prohibits the rendition of such an advisory opinion by a District Court or a District Judge.

These two cases illustrate two of the advisory features of the §3184 procedure, features which add to the nonjudicial, non-Article III nature of that procedure:

(1) The *Ortiz* case demonstrates that even a ruling by a magistrate that no extraditable offense has been shown, or that the offense is political and hence non-

extraditable, can be certified to and reviewed by the Secretary of State. The technique there revealed, following just such a holding by a United States Commissioner, was to reinstitute the extradition matter before a District Judge on precisely the same grounds and to insert the record of the hearings before the Commissioner into the record before the District Judge. See footnote 6, p. 12, *infra*. The District Judge, differing with the Commissioner as to the political nature of the offense, then certified the entire record to the Secretary of State, enabling the latter to review and disagree either with the Commissioner's determination on the evidence before him or with the District Judge's determination.

(2) The instant case presents the unusual feature of the extradition magistrate having found certain claims (the murder charges) inadequately proved and other claims (the financial crime charges) both proved and of a non-political nature. He therefore certified the *entire* record and *all* his findings to the Secretary of State. The latter thereby became empowered to review "every question therein presented"[1] and to "differ from the committing magistrate as to the weight or sufficiency of the evidence to support the charge"[2]—*including the murder charges*.

The contrary position of the United States that the Secretary may not hold sufficient the evidence which the magistrate has found inadequate is not borne out by the authorities cited in its supplemental memo-

[1] Opinion of Solicitor General Phillips to Secretary of State, 17 Op. Att'y Gen. 184, 185 (1881).

[2] Memorandum of Counselor Anderson to Secretary of State Knox, Feb. 5, 1912, quoted in IV Hackworth, Digest of International Law 174 (1942).

randum to this Court. All of the cited authorities[3] deal only with the simple and ordinary situation where the magistrate has found the entire evidence inadequate and consequently has freed the defendant without certifying any record or findings to the Secretary of State.[4] Not one of these authorities mentions the instant situation where the findings as to inadequate proof do not lead to the discharge of the defendant but are certified to the Secretary along with findings as to adequate proof of other charges.

In that situation, the general rule announced and applied by the Secretary would appear applicable—i.e., in the words of Solicitor General Phillips, "Upon the *requisition* being made for extradition, *the whole matter* comes before the Secretary . . . [with] a *power* to review the whole matter." 17 Op. Att'y Gen. 184, 186 (emphasis in original).[5] In short, the certification under §3184 of the findings and testimony is what opens the door to plenary review by the Secretary of

[3] 6 Op. Att'y Gen. 91; Spear, The Law of Extradition (1879), pp. 214, 220, 223-224; 1 Moore, A Treatise on Extradition and Interstate Rendition (1891) p. 550; Hawley, The Law and Practice of International Extradition (1893), pp. 26, 37.

[4] As stated in one of the cited authorities, 1 Moore, A Treatise on Extradition and Interstate Rendition (1891), p. 550, "judicial magistrates have power to discharge the fugitive, and thus to leave the executive without authority to surrender him; while, if they hold that he should be extradited and commit him for that purpose, the executive is not bound to accept their conclusion."

[5] One of the other authorities cited by the Government states that "The executive function of delivery, after the judicial action, with all the testimony connected therewith, has been certified to the Secretary of State, carries with it the power of reviewing all the proceedings and passing judgment upon their correctness." Spear, The Law of Extradition (1879), p. 223.

State. And nothing in the statute limits him to a review only of those findings adverse to the defendant.[6]

Thus the revisory power of the executive over the findings and conclusions of the committing magistrate seems complete and unqualified. The function of the magistrate thereby becomes advisory—a function which an Article III court or an Article III judge cannot exercise. It is this advisory function that has led at least three Attorneys General to rule that though the action of the judge "be in form and effect judicial, it is yet not an exercise of any part of what is technically considered the judicial power of the United States."[7] That conclusion, fully borne out by the proceedings in the *Ortiz* and the instant cases, calls for plenary consideration of the problem by this Court.

B. The "Political Offense" Issue

The decision of Judge Tyler in the *Ortiz* case expresses the critical and highly relevant truth that "a chief reason for the presence of the 'political offense' exception in our extradition treaties is to prevent our legal processes from being used by a foreign regime as instruments of reprisal against its domestic political opponents." See p. 16, *infra*. The opinion makes

[6] Moore has stated that the executive has no authority to surrender a fugitive "upon any charge other than one which has been heard before a magistrate and certified by him to be sustained by the evidence." IV Moore, Digest of International Law (1906), p. 400. But a later authority has refused to make so absolute a statement, stating merely that "It is believed" that the Secretary can surrender only on charges certified to be sustained by the evidence. 2 Hyde, International Law (2d rev. ed. 1945), p. 1060. No statutory or judicial authority can be found to support Moore's statement.

[7] The quoted words are those of interim Attorney General Coffey in 1863 (10 Op. Att'y Gen. 501, 506). Similar statements by Attorney General Nelson in 1843 (4 Op. Att'y Gen. 201, 210-211) and by Attorney General Cushing in 1853 (6 Op. Att'y Gen. 91, 96) are quoted in the Petition, pp. 29-30.

further note of the fact that "where one foreign regime seeks the extradition of an individual for acts done as an official of a prior regime" a situation arises "where this danger is acutely present." See p. 16, *infra*.[8] In the instant proceeding, however, neither the court below nor the committing magistrate exhibited any such realization of the purpose and thrust of the "political offense" concept.

Judge Tyler thereby reflected the admonition of this Court in *Grin* v. *Shine*, 187 U.S. 181, 185, that "Care should doubtless be taken that the treaty be not made a pretext for collecting private debts, wreaking individual malice, or forcing the surrender of political offenders." But he declined to assume such responsibility, preferring to leave the matter to the Secretary of State.

The problems raised by *Ortiz* and by the instant case are whether the inquiry into such an abuse of our legal processes is to be made by the extradition judge or the Secretary of State and, if it is to be made by the judge, what standards of inquiry are to be followed. The instant case presents these problems in their most aggravated and acute form, for here the effort is directed toward the extradition of a former head of state by his domestic political opponents. Such an effort is "wholly unexampled in the annals of United States diplomacy."[9]

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[8] "... it must be emphasized that the whole basis of the [political offense] concept is that the offender is wanted for actions taken by him against the government seeking to punish him." Green, *Political Offences, War Crimes and Extradition*, 11 Int. and Comp. Law Quart. 329, 330 (1962).

[9] "To extradite a former head of state of a foreign nation solely for alleged abuses of his powers during his tenure, would be wholly unexampled in the annals of United States diplomacy. This is especially true because extradition is sought by a regime which replaced the Jimenez rule in 1957; moreover, incumbent President Betancourt of Venezuela had been a member of the government

While the motivation of the foreign government in seeking extradition is not a proper subject of judicial inquiry, the concept of a "political offense" in the setting of an effort to extradite a former head of state for abuses of his official duties is one that should be and must be examined in the course of a §3184 proceeding. Judicial tribunals of other nations, faced with efforts to extradite for analogous politically-related crimes, have faced up to the problem in the context of applying the political offense exception.[10] American tribunals, to the extent they are constitutionally authorized to act, should do no less. The Secretary of State, apparently feeling himself bound by the record before the magistrate, gives no additional opportunity to the defendant to develop all the facts necessary to show the true political nature of the offense. See IV Hackworth, Digest of International Law 173-174 (1942).[11] It thus becomes essential to

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which was replaced in 1948 by a group of which General Jimenez was a leading figure." Letter dated May 27, 1963, to Secretary of State Rusk from John de J. Pemberton, Jr., Executive Director of the American Civil Liberties Union, protesting petitioner's extradition and urging that he be granted political asylum in the United States.

[10] Thus the Swiss federal tribunal has held the act of stealing money from the public treasury for the sole purpose of aiding a revolutionary party to gain control of the government to be a common crime directly connected with a political crime and hence no basis for extradition. Case of Keressilidze and Magaloff, Feb 12, 1907, noted in Deere, *Political Offenses in the Law and Practice of Extradition*, 27 Am. J. of Int. Law 247, 248 n. 10 (1933).

[11] Hackworth quotes the following from a memorandum prepared by the Counselor of the Department of State in 1912 for the use of the Secretary: "It has been customary for the Secretary to confine himself to the facts of the case presented in the record which has been certified up to him by the committing magistrate. On this principle the Department has consistently refused to consider additional facts not appearing in the record whether presented to the Department on the part of the requesting government, or on behalf of the fugitive criminal."

permit the development of the pertinent facts before the magistrate and to secure his considered judgment thereon. Otherwise the important "political offense" exception in our extradition treaties becomes a dead letter.

Therefore, proper standards for the magistrate to follow in formulating and evaluating the "political offense" concept must be laid down. And those standards must be crystallized against the backdrop of the main purpose of the "political offense" concept—a concept designed to preclude extradition by one's domestic political opponents for alleged crimes involving the political organism or sovereignty of the demanding government. To leave the problem solely in the hands of the Secretary of State, as Judge Tyler did, is to abdicate a necessary function of the magistrate and to augment his subservience to the executive.

This problem is accentuated in the instant case by the magistrate's action in cutting off petitioner's efforts to develop the full record necessary to a fair evaluation of the "political offense" claim, once that concept be properly defined.

The *Ortiz* opinion highlights the need for viewing the "political offense" concept in terms of its major political purpose and then applying it to the kind of political situation here present. Certiorari should therefore be granted so that the basic principles can be defined.

CONCLUSION

For these reasons, supplementing those in the Petition, the order denying certiorari should be reheard and vacated, and the writ of certiorari should issue to review the judgment below.

Respectfully submitted,

DAVID W. WALTERS
1008 Ainsley Building
Miami 32, Florida

EUGENE GRESSMAN
1730 K Street, N. W.
Washington 6, D. C.

Counsel for Petitioner

June 7, 1963

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

EUGENE GRESSMAN

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M18-65

In the Matter of the Extradition of

CLODOVEO ORTIZ GONZALEZ,

A Fugitive from the Justice of the Dominican Republic.

Opinion

ROBERT M. MORGENTHAU, United States Attorney for the Southern District of New York by
PETER K. LEISURE, Assistant United States Attorney, and
ERIC J. BYRNE, Attorney, Department of Justice, Washington, D. C.

BERTRAND D. GERBER, ESQ., and
EDWARD CHERNEY, ESQ., of New York, N. Y.,
Attorneys for Respondent.

TYLER, D.J.

Under procedures set forth in 18 U.S.C. 3184 (9 Stat. 302 (1848)) the United States Attorney here proceeds on behalf of the Dominican Republic in seeking the extradition from this country of Clodoveo Ortiz Gonzalez ("Ortiz"), a national of the Dominican Republic.

The demand for extradition is made under the terms of a Convention entered into between the United States and the Dominican Republic, proclaimed on August 26, 1910, which provides for the extradition, to the demanding state, of any person "who may be charged with, or may have been convicted of any of the [following] crimes[:] . . . murder . . .".

On March 6, 1962, a "warrant of provisional arrest" was issued by the Dominican authorities against Ortiz. In an accompanying "Summary Judicial Certification", it is stated:

"In accordance with the depositions made before this Judge on January 31 . . . 1962 . . . the criminal liability of the accused . . . has been fully established[:] . . . Clodoveo Ortiz Gonzalez did, by means of torture in the house of detention named "the 40", kill the persons named . . . Deschamps . . . and . . . Espertin-Oliva . . . on August 12 . . . (1960), as is attested by the eyewitnesses . . . Tineo and . . . Saavedra."

The affidavits of Tineo and Saavedra amply support the conclusion that Ortiz was one of those who, acting in a military or quasi-military capacity under the regime of Generalissimo Rafael Trujillo,[1] did actively participate in the torturing and killing of the two named prisoners.

The burden of proof which must be met in order that certification of an "extraditable offense" be made by this court under 18 U.S.C. 3184 is that the case be proved with the degree of sufficiency necessary to justify commitment for trial under local law.[2] On the record before me, this burden has been met with respect to the crime of murder charged here.[3]

There remain, however, two issues of law.

The treaty applicable here, in common with most treaties of extradition, contains a provision excluding extradition

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[1] Generalissimo Trujillo was assassinated in May, 1961.

[2] *Collins* v. *Loisel*, 259 U.S. 309, 315-316 (1922); *United States* v. *Stockinger*, 269 F. 2d 681, 684 (2d Cir. 1959) (". . . reasonable ground . . .").

[3] The law to be applied is both the local law and the law of the demanding state; that is, the crime must be made out under both legal systems. *Petit* v. *Walshe*, 194 U.S. 205, 217-218 (1904). The United States-Dominican Republic Convention of Extradition, Article I.

"for any crime or offense of a political character . . . [and] . . . acts connected with such crimes or offenses".[4]

Ortiz bases his opposition to the certification of extraditable offense here sought chiefly on the argument that the crime charged falls within this "political offense" exception.

On March 7th, 1963, a United States Commissioner in this District denied extradition of Ortiz for the very crimes charged here, on the grounds that, though amply proved, they were political offenses and as such not cause for extradition. This determination is not finally binding in later, renewed, proceedings.[5] I am constrained to hold that, on the facts disclosed by the record before me, the political offense exception does not apply.[6]

The conception of "political offense", in the context of extradition, is a familiar one.[7]

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[4] See, Research in International Law, *Extradition*, 29 American Journal of International Law (1935) (Supplement) 108-109. There are two, closely related, reasons for the political offense rule. (1) To the extent that an act is "politically" motivated, there may be lacking the *scienter*, or other elements, present in common criminal conduct. Hyde, 1 *International Law* 572 (1922); *In re Castioni*, 1 Q.B. 149, 165-167 (1890). (2) It might be feared that the demanding government will deal arbitrarily and summarily with its political enemies. Hyde, *op. cit.*, p. 572; English Extradition Act, 33 and 34 Vict. c. 52 § 3 (1870) ("A fugitive criminal shall not be surrendered if the offense . . . is one of a political character or if . . . the requisition for his surrender has in fact been made with a view to try to punish him for an offense of a political character."); *Cf.*, Research in International Law, *Extradition*, *supra*, at p. 22 (draft extradition convention § 5(a)).

[5] *United States* v. *Levy*, 268 U.S. 390 (1925); *Collins* v. *Loisel*, 262 U.S. 426 (1923).

[6] By stipulation of the parties, the record of the hearings before the United States Commissioner have been made part of the record before this court.

[7] Footnote four, *supra*.

Both the English and American cases dealing with this issue recognize the leading case to be *In re Castioni*, 1 Q.B. 149 (1891).

That was a case of first impression in England, applying for the first time the "political offense" exception contained in the applicable extradition statute, 33 and 34 Vict. c. 52 (1870). In that case, the Swiss government sought the extradition of one Castioni for a fatal shooting done by him while he was participating in a violent popular demonstration protesting the government's refusal to submit a proposed constitutional revision to popular vote.

The Queens Bench Division held that extradition for this crime was barred since it was a "political offense".

There are three concurring opinions in *Castioni* which discuss the "political offense" concept at some length. However, they are fairly summarized by the much-quoted definition, set forth by Hawkins, J., according to which those offenses are political which "were incidental to and formed a part of political disturbances." *In re Castioni*, 1 Q.B. at p. 166.

Authorities on international law restate the prevailing Anglo-American law in essentially this form.[8]

A leading American case in this area establishes that the political offense exception is applicable to acts of government agents seeking to suppress an uprising, as well as to the acts of those participating in the uprising. *In re Ezeta*, 62 Fed. 972, 1002 (N.D. Calif. 1894). See also, *Karadzole v. Artukovic*, 247 F. 2d 198 (9th Cir. 1957), *rev'd on other grounds*, 355 U.S. 393 (1958).

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[8] Hyde, *op. cit.*, p. 573; Garcia-Mora, "The Nature of Political Offenses", 48 Va. L. Rev. 1226, 1240 ff. (1962); Deere, "Political Offenses in the Law and Practice of Extradition", 27 American Journal of International Law 247, 266 (1933).

In either event, however, the general rule is that there must be an "uprising", and that the acts in question must be incidental to it.[9]

A hearing was conducted before this court on March 27, 1963,[10] to determine whether in August, 1960, there was

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[9] Notwithstanding the validity of this general proposition of law, it must be emphasized that the "political offense" concept is essentially a flexible one. Judge Denman, in *In re Castioni*, 1 Q.B. 149, 155 (1891), stated: "I do not think it is necessary or desirable that we should attempt to put into language in the shape of an exhaustive definition exactly . . . every state of things which might bring a particular case within the description of an offense of a political character." This in a sense presaged a recent holding of the same court, *Ex parte Kolczynski*, 1 Q.B. 540 (1955), that mutiny by the crew of a small Polish fishing trawler was a "political offense", notwithstanding that it was not an incident of a political uprising. This case indicates, first, that at least under English law, there is no absolute requirement that there be a political uprising in order for the political offense exception to be applicable; but that the only indispensable ingredient is that the acts be politically motivated and directed towards political ends. 1 Q.B. at p. 550. Secondly, *Kolczynski*, as well as the history of the political offense exception in Anglo-American law, arguably indicate that the political offense exception legitimately can be applied with greater liberality where the demanding state is a totalitarian regime seeking the extradition of one who has opposed that regime in the cause of freedom. *Cf.*, Oppenheim, 1 *International Law*, pp. 704-705 (1955); Deere, "Political Offenses in the Law and Practice of Extradition", 27 American Journal of International Law 247, 251 (1933). Indeed, these two factors are closely related: In an effectively repressive totalitarian regime, traditional "political disturbances" or "uprisings" may be unknown despite deep and wide-spread hostility towards the regime. Applying these two factors to the case at bar: (a) The issue whether the acts of Ortiz should be deemed "politically motivated and directed towards political ends" is treated post, pp. 9-10. (b) Nothing in the record before me suggests that the second-named factor is applicable; that is, this does not appear to be a case in which the acts in question were blows struck in the cause of freedom against a repressive totalitarian regime.

[10] On April 3, 1963, a further hearing was held, but on that date no testimony was taken.

such a condition of "uprising" or political disturbance in the Dominican Republic as would justify application of the "political offense" exception to the killings allegedly then committed by Ortiz. The testimony given at that hearing establishes that there was no such disturbed political condition.

Moreover, nothing in the record before me suggests that Ortiz acted with such essentially political motives or political ends as might justify substantial relaxation of the "political disturbance" requirement. (See footnote 9, supra). Indeed, any other conclusion would be contrary to a second contention of Ortiz here, which is that his acts were those of a military subordinate obeying the orders of a superior, and hence were essentially incidents of a system of military discipline.

To the extent that this contention is valid, and I conclude from the record before me that it is largely so, Ortiz' conduct must be regarded as flowing not so much from a personal commitment to a political cause, as from a personal commitment to a system of military discipline. This, in my view, particularly reinforces the conclusion that the "political offense" principle or exception is inapplicable here.[11]

This raises a second issue of law, which is the effect of Ortiz' contention that he acted under the orders of a superior and in the exercise of public authority, and that hence his conduct cannot be deemed criminal.

There is authority for the proposition that "defenses", such as this one, are not to be considered in extradition proceedings but are to be left for the trial court.[12] The

[11] The motive or purpose behind the conduct is a significant factor. *In re Castioni*, 1 Q.B. at pp. 159, 167 (1891); *Ex parte Kolczynski*, 1 Q.B. at p. 550 (1955); Research in International Law, *op. cit.* (draft convention on extradition, § 5(b)) ("... offenses having a political objective ..."); *Cf. Argoud v. Ruiz*, 161 U.S. 502, 512 (1896) ("... political intentions ...").

[12] *In re Ezeta*, 62 Fed. 972, 986 (1894).

thrust of this rule, however, is simply that the extradition court may not attempt to finally resolve issues of fact raised by defenses directed to the merits of the charge. This cannot overturn or impinge upon the rule that the demanding state has the burden of proving the governing law, and of making out its *prima facie* factual case, with respect to any matter which the extradition court deems important, and *bona fide* at issue, bearing on the guilt or innocence of the accused. The criminality *vel non* of these acts of Ortiz, assuming them to have been performed by him as an agent of the Dominican government, is such an issue in this case.

The Dominican Republic has met its burden with respect to this issue. Specifically, I am satisfied that under the Dominican law, as under our own law, public officials may be criminally liable for acts which fall well outside duly constituted public authority,[13] and that there is a *prima facie* case that this rule is applicable to the extraordinary homicidal acts ascribed to Ortiz.

Thus, the requirements set forth in 18 U.S.C. 3184 have been satisfied. One further word, however, may be appropriately added.

As noted above,[14] a chief reason for the presence of the "political offense" exception in our extradition treaties is to prevent our legal processes from being used by a foreign regime as instruments of reprisal against its domestic political opponents.

The state of facts in the case at bar where one foreign regime seeks the extradition of an individual for acts done as an official of a prior regime, presents, at least superficially, a situation where this danger is acutely present.

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[13] Wharton, 1 *Criminal Law & Procedure*, 452 (1957); affidavit of Emil Weinberg, of the Dominican Republic, submitted in these proceedings.

[14] Footnote four, *supra*.

While I have no reason to believe that this danger has materialized in this specific case, I nonetheless fully endorse the following passage from the opinion of the District Court in *In re Lincoln*, 228 Fed. 70, 74 (E.D.N.Y. 1915):

". . . [I]t is not a part of the court proceedings nor of the hearing upon the charge of crime to exercise discretion as to whether the criminal charge is a cloak for political action, nor whether the request is made in good faith. Such matters should be left to the Department of State . . .[5]

"It is thought by the court that application to the Secretary of State of the United States will furnish full protection against the delivery of the accused to any government which will not live up to its treaty obligations, and that the Secretary of State will be fully satisfied (before delivering the accused to the demanding government) that he is wanted (in the legal sense of that term) upon a criminal charge, that it is not sought to secure him from a country upon which he is dependent as an asylum because of political matters, and that the treaty is not actually used as a subterfuge".

In conclusion, it is here determined that the evidence is sufficient to sustain the charge, for which the extradition of Clodoveo Ortiz Gonzalez is sought, under the provisions of the applicable convention. The Clerk is directed, pursuant to the statute, to certify a copy of this opinion and the record in this case, including transcripts of all testimony received, to the Secretary of State of the United States.

So Ordered.

Dated: New York, N. Y.
May 23, 1963.

s/ Harold R. Tyler, Jr.
U.S.D.J.

[5] Ind. cd. 18 U.S.C. 3184 gives this court no authority to inquire into such matters.